

1 APPEARANCES CONTINUED:

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3
4 SCHNADER HARRISON SEGAL & LEWIS, LLP
5 BY: RICHARD BARKASY, ESQ.

6 -and-

7 MIDDLETON REUTLINGER
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9 BY: BRIAN MCGRAW, ESQ.

10 Counsel for the Defendants

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14 P R O C E E D I N G S

15 (Proceedings commenced at 10:35 a.m., and the
16 following occurred in chambers.)

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10:27:12 20 THE COURT: All right. Please, those of you who
10:27:16 21 stood, please be seated. Good morning. So this is the
10:27:21 22 pretrial conference in American Cruise Lines versus HMS
10:27:30 23 American Queen Steamboat Company.

10:27:31 24 And Mr. Kraftschik, you are here. Good morning.
10:27:35 25 You have a slew of people here with you.

10:27:37 1 MR. KRAFTSCHIK: I do, Your Honor. We did think
10:27:39 2 we were going to be in the courtroom so we brought some
10:27:42 3 people that were working on the team. So we have with us
10:27:45 4 today, David Williams, Charlie Simmons, Michael Naccarato,
10:27:52 5 all from Gorman & Williams. And in the back, Taylor
10:27:54 6 Beckham, Ashley Ensor, Robert Kline, and Jeffrey Lyons from
10:27:59 7 Morris Nichols.

10:28:00 8 THE COURT: Okay. So good morning to all of
10:28:03 9 you.

10:28:03 10 Mr. Barkasy.

10:28:06 11 MR. BARKASY: Your Honor, with me is Dennis
10:28:09 12 Murrell and Brian McGraw and Lori Smith.

10:28:12 13 THE COURT: You don't have a chair?

10:28:14 14 MS. SMITH: No, I needed to stand up for my
10:28:17 15 back, but thank you, sir.

10:28:18 16 THE COURT: Yes. Feel free to walk around if
10:28:21 17 that helps.

10:28:23 18 MS. SMITH: Thank you.

10:28:24 19 THE COURT: Okay. So good morning to you all.

10:28:29 20 So I had a few random questions after reading
10:28:33 21 some of this. And let me try to just deal with things in no
10:28:43 22 particular order. And I say that -- I guess before I do
10:28:46 23 that, is there anything that the two of you, the sides that
10:28:50 24 have been talking about that you want to address first?

10:28:52 25 MR. WILLIAMS: We do, Your Honor, that we

10:28:53 1 thought might kind of help clarify a little bit where we
10:28:58 2 are.

10:28:58 3 THE COURT: Okay.

10:28:59 4 MR. WILLIAMS: Not to preempt what you have in
10:29:01 5 mind.

10:29:02 6 THE COURT: No.

10:29:02 7 MR. WILLIAMS: But we did talk.

10:29:04 8 THE COURT: I have learned over time, even
10:29:06 9 though I forget it half the time as Mr. Kraftschik can
10:29:11 10 probably tell you, sometimes it's probably better to see
10:29:13 11 what happens since the papers were submitted.

10:29:16 12 MR. WILLIAMS: Having counsel get here from
10:29:20 13 Louisville, that helped. We had a little chat this morning.
10:29:23 14 Basically the pretrial order is in the basic core order. We
10:29:28 15 did submit the voir dire and the special verdict sheets I
10:29:32 16 think came in last night.

10:29:33 17 THE COURT: Yes.

10:29:33 18 MR. WILLIAMS: But with apologies, I can only
10:29:37 19 tell you that everybody on our side has been working here
10:29:40 20 day and night. And I'm sure that's true of the Louisville
10:29:44 21 crew as well.

10:29:44 22 THE COURT: There was not going to be a portion
10:29:47 23 of criticism here.

10:29:48 24 MR. WILLIAMS: Mr. Kraftschik in his good wisdom
10:29:51 25 advised me to apologize to the Court.

10:29:53 1 THE COURT: He is wise in that way, I mean, but
10:29:56 2 I'm in a good humor.

10:29:57 3 MR. WILLIAMS: Thank you. So what we discussed
10:30:01 4 actually was that we realize this is important for them to
10:30:04 5 get done even though the trial is now hence a couple of
10:30:07 6 months. So we were thinking to have a deadline sometime
10:30:10 7 towards the end of October, and before then to not only have
10:30:15 8 the jury instructions to the Court, but also try -- all the
10:30:19 9 documents are listed, but there are any number of objections
10:30:23 10 and back and forth about the documents and about the
10:30:25 11 deposition designations.

10:30:27 12 THE COURT: Yes. Those are things that I
10:30:29 13 normally expect you all to work out. I'm sure -- again,
10:30:35 14 both of your Delaware counsel can tell you they're not
10:30:38 15 things that I talk about at this stage of the matter.

10:30:41 16 MR. WILLIAMS: What we propose to do is to have
10:30:44 17 a get together in person, where, TBA, and try to go through
10:30:53 18 those actually in person in a session and be able to report
10:30:56 19 to the court by the end of October.

10:30:57 20 MR. MURRELL: On the jury instructions and work
10:31:00 21 out our other issues between us.

10:31:04 22 THE COURT: Okay. Well, sounds good.

10:31:06 23 MR. WILLIAMS: That's kind of our thought.

10:31:08 24 Now, there are some issues in the pretrial order
10:31:11 25 itself about the mechanics of the trial and so forth.

10:31:15 1 THE COURT: Right. I think I tabbed them.

10:31:16 2 MR. WILLIAMS: Just gently I want to raise one
10:31:20 3 other issue. The order that's signed for our stipulation
10:31:24 4 was now for January 7. Now that the November trial date is
10:31:31 5 out --

10:31:31 6 THE COURT: I took that off the calendar. I had
10:31:34 7 some other trials scheduled that week, too.

10:31:36 8 MR. WILLIAMS: We understand that totally. The
10:31:38 9 question is, we understand there may be, there still is,
10:31:43 10 Mr. Kraftschik can tell us a trial ahead of us for the
10:31:47 11 January 7th.

10:31:48 12 THE COURT: Yes, I'm thinking something will
10:31:51 13 work out, but I believe the other trial is a trial that if
10:31:56 14 push comes to shove I believe it's not actually that
10:31:59 15 difficult to move because I think it's essentially a guy who
10:32:03 16 was -- who says that two or three county or possibly state
10:32:10 17 police officers beat him up. And I think it's going to be
10:32:14 18 mostly his testimony and their testimony. And they're all
10:32:17 19 from Delaware, so I don't think that that's hard to move.
10:32:22 20 But yes, there is one trial that shares your date.

10:32:25 21 So anything else?

10:32:29 22 MR. WILLIAMS: So those are the things that we
10:32:31 23 discussed. Unless you have anything else, Dennis.

10:32:34 24 MR. MURRELL: No. Based upon what you just told
10:32:36 25 us, I don't think there is a need to get another backup

10:32:38 1 date.

10:32:38 2 THE COURT: Let's not do that right now.

10:32:46 3 So let me address what seemed to be the most
10:32:57 4 significant request in the pretrial order, which is the
10:33:03 5 issue that I believe, I forget, one side or the other raised
10:33:08 6 about, I think the plaintiff raised about the amount of time
10:33:11 7 that's allocated for this. So I have a number of different
10:33:20 8 thoughts. One of which is I can get you an extra
10:33:26 9 two-and-a-half hours or so by suggesting that we pick the
10:33:33 10 jury on the Thursday or Friday before the week that's
10:33:36 11 scheduled for trial. So that was one thought.

10:33:44 12 The second thought was this, I looked, I skimmed
10:33:51 13 the verdict forms, and I basically counted up the
10:33:58 14 twenty-three questions one side wanted the jury to ask and
10:34:01 15 the seventeen questions the other side wanted the jury
10:34:06 16 asked, and then because I really only saw it this morning, I
10:34:12 17 tried to get a sense of how many issues you all actually
10:34:18 18 want the jury to be deciding. And so I had been thinking
10:34:27 19 about the jury instructions from the point of view of --
10:34:33 20 because my concern is not so much -- not so much that there
10:34:42 21 is not enough time to fairly present a case, but that the --
10:34:54 22 essentially -- and notwithstanding the efforts by the
10:34:59 23 parties to trim out some of the less important things, that
10:35:05 24 it still a huge confusing mess that you're going to try to
10:35:12 25 present to a jury, and so one of the things that I was

10:35:17 1 thinking about was whether in the stipulation order
10:35:29 2 regarding trial where you have A, B, and C as to what you
10:35:35 3 wanted to try in the first trial frame, I was trying to
10:35:40 4 figure out how much the thing that's designated A, which is
10:35:47 5 the American Cruise Lines mark, and the American Queen
10:35:56 6 Steamboat Company name, how closely related that was to B
10:36:02 7 and C, because B is the marks for various vessels, and then
10:36:10 8 various vessels that supposedly infringe, and then C is the
10:36:15 9 counterclaims.

10:36:16 10 And so I was wondering, and I am not in a -- I
10:36:22 11 don't have much of an opinion. I mean, I don't really have
10:36:25 12 any opinion, but I was wondering whether they're still too
10:36:31 13 much in what you want to present to the jury in that trial.

10:36:37 14 So that's a way of saying that -- so I'm not
10:36:50 15 real inclined to want to make a longer trial. I am -- but I
10:36:56 16 do want to try to make sure that a trial that we have has a
10:37:02 17 reasonable number of issues to be decided relative to the
10:37:06 18 length of the trial. And so that was a thought that I was
10:37:13 19 having was, you know, is there a way -- that it seemed to me
10:37:20 20 based on the verdict form and based on some of the things I
10:37:26 21 was reading in the pretrial order, that there still is just
10:37:31 22 too much in this one trial that you have scheduled to be
10:37:35 23 done, whether it's done in five days, seven days, who knows,
10:37:39 24 there is just too many issues, it's too confusing. I
10:37:47 25 suspect -- in any event, that's the concern that I have.

10:37:56 1 So beside that overall concern -- and so partly
10:38:11 2 what I had been thinking was that to some extent maybe I
10:38:19 3 would know how much of a -- how valid my concerns are, but I
10:38:37 4 saw the jury instructions that go along with what you want
10:38:41 5 to try. Because a lot of times -- you know, it's kind of
10:38:44 6 hard to look at the verdict forms, but when I see the jury
10:38:48 7 instructions, and particularly, you know, where it seemed
10:38:51 8 like a lot of it is, you know, well, we have a mark, well,
10:38:57 9 it's not a good mark because of this, well, you can't use
10:39:02 10 that because of this, and you know, burdens of proof go back
10:39:06 11 and forth. In any event, so I was thinking about that.

10:39:10 12 The second thing that I noticed, I actually
10:39:13 13 noticed from reading some of this, the pretrial order but
10:39:17 14 that I also saw in the verdict form, and I may have brought
10:39:25 15 this up with you before, and maybe you even gave me an
10:39:29 16 answer that satisfied me, but a lot of the things like when
10:39:33 17 I see equitable estoppel and unclean hands, that I'm going
10:39:39 18 these are issues for a jury? And so I don't know. But I
10:39:45 19 didn't see anything in the fifty pages of pretrial order
10:39:49 20 that I read or anywhere else that suggested to me that you
10:39:53 21 thought any of these issues were judge issues. But I am
10:40:00 22 wondering about that.

10:40:04 23 MR. WILLIAMS: Your Honor, we do, and Charlie
10:40:07 24 Simmons here has delved into the law a little bit about
10:40:11 25 that. We did try to put in the verdict form some of the

10:40:14 1 facts that the jury would provide answers to, to assist the
10:40:18 2 Court. Maybe that's an exercise we don't need.

10:40:22 3 THE COURT: I'm not sure.

10:40:23 4 MR. WILLIAMS: You may have experience from the
10:40:25 5 patent world that correlates to this.

10:40:29 6 THE COURT: Well, only that's the kind of thing
10:40:31 7 that suggest to me that there are some issues that judges
10:40:35 8 are supposed to decide and not juries.

10:40:37 9 MR. WILLIAMS: We agree.

10:40:39 10 MR. SIMMONS: As we wrestled through it, Your
10:40:41 11 Honor, it really came to light in the instructions, the
10:40:44 12 equitable affirmative defenses that you have raised, the
10:40:47 13 equitable estoppel, acquiescence and unclean hands are all
10:40:53 14 in the nature of equitable defenses. What we tried to do in
10:40:57 15 our version of the verdict sheets is say what factual
10:41:03 16 underpinnings would Your Honor need to make rulings on it,
10:41:06 17 that even creates six or seven fact questions that the jury
10:41:10 18 would have to respond to in order for Your Honor to make
10:41:12 19 those rulings if we go that route.

10:41:15 20 THE COURT: I guess the first question I have is
10:41:17 21 have the two sides talked about this in terms -- I mean, do
10:41:21 22 you all have an understanding between yourselves as to yeah,
10:41:25 23 there are some issues here to be decided by a judge and what
10:41:28 24 they are?

10:41:29 25 MR. MURRELL: We have not. The draft

10:41:32 1 instructions were still in play late last night between the
10:41:35 2 parties trying to get them done before today. I think
10:41:38 3 that's one of the things we would talk in a meet and greet
10:41:41 4 to discuss how we get things ready for trial. Some of these
10:41:45 5 are definitely equitable claims that you could decide.
10:41:48 6 They're also claims that involve questions of fact and you
10:41:52 7 could either -- as I understand they're suggesting have
10:41:54 8 factual determinations made by the jury and then you rule
10:41:58 9 upon it. There are also things that you could ask for an
10:42:02 10 advisory opinion from the jury and decide but they are
10:42:06 11 definitely questions of fact. However the Court wants to
10:42:10 12 handle that, I think that's your call.

10:42:12 13 We do see them as being very important
10:42:15 14 affirmative defenses, especially the acquiescence claim as
10:42:20 15 being one that involves questions of fact and questions of
10:42:24 16 witness credibility quite frankly that is normally the
10:42:28 17 province of a jury.

10:42:29 18 THE COURT: But if they are equitable, in the
10:42:33 19 patent world when they're to be decided by the judge because
10:42:37 20 they're in the nature of an equitable defense, the judge can
10:42:43 21 make the credibility decisions. And my experience, which is
10:42:48 22 pretty limited, actually, does make the credibility
10:42:51 23 decisions. And to some extent here where it seems like --
10:43:00 24 it seems like the parties want the jury to make a slew of
10:43:04 25 decisions. The fewer decisions that they have to make, the

10:43:07 1 better the chance that they will grasp what they need to
10:43:11 2 make the ones that they do have to make, in my opinion.

10:43:17 3 MR. WILLIAMS: Your Honor, if I can just say the
10:43:18 4 verdict form that we put to the Court last night was based
10:43:22 5 on sort of what's the minimum, you know, we need to do at
10:43:28 6 least this to be sure. That's not to say that we would
10:43:31 7 be -- you know, I would like to think about what you just
10:43:35 8 said, let's put it that way, maybe talk to my client, talk
10:43:38 9 to Mr. Murrell about it.

10:43:39 10 THE COURT: I guess what I'm thinking is to some
10:43:42 11 extent if you're going to have a sit down in October at some
10:43:46 12 point to resolve these things, it seems to me like there is
10:43:51 13 probably not that much more discussion to have today. But
10:43:55 14 the best thing is first for you all to try to resolve that
10:44:00 15 for what it's worth. And I don't say this as an ironclad
10:44:06 16 rule, but for what it's worth whenever there have been
10:44:11 17 equitable issues that -- put it like this, I have never
10:44:18 18 gotten the purely advisory verdict from a jury before, and
10:44:25 19 my inclination is not to start now. But if you -- but I'm
10:44:31 20 open to persuasion because I think as you also know, not
10:44:36 21 only have I never tried a trademark case before, there is
10:44:42 22 only one other time where I have ever had a trademark case
10:44:45 23 that, you know, went beyond complaint filed, complaint
10:44:51 24 dismissed, so I'm quite uncertain about a lot of things
10:44:59 25 here.

10:44:59 1 MR. MURRELL: If I can, too, Your Honor, just so
10:45:02 2 it helps our discussion, if the determination is made that
10:45:07 3 the equitable claims you're going to decide, do you
10:45:11 4 anticipate us still putting that evidence on during the
10:45:14 5 trial for your consideration or to do that at a later date?

10:45:18 6 THE COURT: That's a thing, at least in the
10:45:20 7 patent world where it has come up, they have been
10:45:23 8 essentially sort of severable kinds of issues. So the
10:45:28 9 general, what I understand to be the general approach of
10:45:34 10 judges of this court, and has been my approach on the
10:45:38 11 approximately two times I have done it, is the evidence that
10:45:45 12 goes -- if the evidence is only being admitted on the
10:45:48 13 equitable issue, then the jury doesn't hear it. And I have
10:45:53 14 offered before to do it in the evening if it's some witness
10:45:58 15 who is coming in and out of town, but so far the two times,
10:46:05 16 at least the two times that I can remember that I have done
10:46:08 17 it, we basically started the equitable portion while the
10:46:12 18 jury goes out with the jury portion.

10:46:17 19 But a lot of it depends, because in the patent
10:46:20 20 world, the equitable portion is always boiled down to three
10:46:24 21 hours of testimony is enough, or three or less. I don't
10:46:29 22 know what that would -- I don't have any sense of what would
10:46:33 23 be involved here.

10:46:36 24 MR. WILLIAMS: You know, again, we do have a
10:46:41 25 concern, your comment about too many issues, too confusing,

10:46:46 1 we take very much to heart. I mean, my client had wanted a
10:46:55 2 jury trial, but the suggestions you're making might make
10:47:00 3 sense. I think to come back to you in October would make a
10:47:05 4 lot of sense.

10:47:06 5 MR. MURRELL: I mean, these are fairly dynamic
10:47:11 6 issues that change a case a lot. I wouldn't want to make a
10:47:13 7 recommendation sitting here without discussing with my
10:47:16 8 client.

10:47:17 9 THE COURT: Yes. Essentially when Mr. Williams
10:47:21 10 started talking about getting together in October, at first
10:47:25 11 I thought he was talking about get together to include me,
10:47:28 12 but then I realize he was saying no, you all are going to
10:47:32 13 meet and try to hash this out. I'm perfectly happy and I
10:47:35 14 think it would make sense for a lot of reasons for us to
10:47:39 15 schedule another get together with me.

10:47:41 16 MR. MURRELL: After that.

10:47:42 17 THE COURT: Yes. Maybe in November. And some
10:47:50 18 of the things that are being raised as an issue today that,
10:47:57 19 you know, would be in a position to hopefully resolve in
10:48:01 20 November and then you still have two months before the trial
10:48:04 21 is scheduled.

10:48:06 22 Is there anything else, otherwise, then I do
10:48:09 23 have some other things?

10:48:11 24 MR. MURRELL: No.

10:48:12 25 THE COURT: So one of the things was this, I got

10:48:20 1 the two different sets of requests for voir dire. I believe
10:48:24 2 the plaintiffs sort of followed my usual format. And
10:48:32 3 Mr. Kraftschik, do you know was there a word version of that
10:48:36 4 submitted, too, or will be?

10:48:38 5 MR. KRAFTSCHIK: There will be, Your Honor. We
10:48:39 6 wanted to vet the instruction issue with you first.

10:48:43 7 THE COURT: Here is what I think I'm going to do
10:48:45 8 on that. And it's based on a very cursory skim. I'm going
10:48:50 9 to work from the usual format that I use. I will look at
10:48:55 10 the questions you have submitted, and to the extent that I
10:48:59 11 am going to ask them, I will work them into my usual format.
10:49:05 12 I think it's possible that if we have conference in
10:49:10 13 November, I can do that and file something so you can have a
10:49:16 14 look at it before we meet in November. You know, one of the
10:49:21 15 things that just on a surface inspection of your questions
10:49:25 16 that I don't like about them is that everybody is going to
10:49:29 17 answer yes. And so I prefer to have more targeted
10:49:35 18 questions, not have you ever been on a cruise, but have you
10:49:37 19 ever been on a cruise with American Cruise Lines or HMS
10:49:42 20 American Queen Steamboat Company. And you know, probably
10:49:47 21 proving your point, half of them are going to say I don't
10:49:51 22 know who I was with. But you know, we'll get the answers.
10:49:56 23 But you know, if they just have been on a cruise somewhere,
10:50:00 24 it's not actually about cruising.

10:50:02 25 MR. WILLIAMS: Right.

10:50:04 1 THE COURT: So I think I can work in some of
10:50:06 2 yours. But the one place where I don't want to spend my
10:50:10 3 time is this: In the plaintiff's version, they had a
10:50:16 4 synopsis of what the case is. Is that a synopsis that you
10:50:21 5 agree with or you haven't had a chance to think about or you
10:50:25 6 would have your own.

10:50:29 7 MR. McGRAW: We didn't get their questions until
10:50:31 8 about 11 o'clock last night.

10:50:37 9 THE COURT: Fair enough. The best synopsis is
10:50:40 10 the one you all agree on because I'm in a bad position with
10:50:45 11 lack of knowledge. If I have to synopsise it, the plaintiff
10:50:49 12 had some trademarks, defendant had some trademarks, they're
10:50:52 13 arguing about it, that's what the case is about.

10:50:54 14 MR. MURRELL: They don't like each other.

10:50:56 15 THE COURT: Because I'm pretty sure then I'm not
10:50:59 16 misstating. And, of course, too much detail is not actually
10:51:03 17 helpful anyhow.

10:51:08 18 MR. KRAFTSCHIK: Your Honor, could we just
10:51:10 19 suggest maybe, I don't know what time frame makes sense, on
10:51:13 20 working together over the next week.

10:51:15 21 THE COURT: Here is what I'm thinking is, you
10:51:18 22 know, if you're going to meet in person, you should probably
10:51:21 23 try to do that before like October 15th. And you can
10:51:27 24 address all these things. And we'll schedule something for,
10:51:36 25 depending on my schedule, I didn't actually bring my

10:51:39 1 calendar, but I can get it easy enough, we'll schedule
10:51:42 2 something for roughly, you know, the first week of November,
10:51:47 3 something like that, because I think we could work a lot of
10:51:50 4 this stuff out on this kind of plan, and then there is that
10:51:55 5 much less for you all to be concerned about.

10:52:00 6 So, the voir dire. The verdict forms. We have
10:52:06 7 talked about that. Unless there is anything else about
10:52:10 8 that, I have tabbed the various places in the main body of
10:52:13 9 the pretrial order where you had a dispute, and I think I'm
10:52:17 10 prepared to address those.

10:52:19 11 So page 21 and 22, you had two kinds of disputes
10:52:31 12 of the same nature on the identification of exhibits to be
10:52:36 13 used during direct examination. And so the plaintiff's
10:52:42 14 proposal, I wouldn't say necessarily anything about the
10:52:47 15 particular times that are involved, but the idea that the
10:52:50 16 plaintiff, or that the party is calling a witness is going
10:52:54 17 to provide a list of the exhibits to be used in connection
10:52:57 18 with the direct examination, that's a very standard part of
10:53:04 19 how cases are tried, cases of this nature are tried here.
10:53:11 20 Do you have -- but I understand the defendant doesn't want
10:53:14 21 to do that. Do you mind telling me why?

10:53:18 22 MR. MURRELL: We talked about it on the way up
10:53:20 23 here, and you know, I tried a couple of cases in my
10:53:23 24 lifetime, I have never had that. My initial reaction was
10:53:27 25 that's essentially handing them the outline of my direct

10:53:32 1 exam.

10:53:33 2 THE COURT: Maybe that's the point.

10:53:34 3 MR. MURRELL: Right, but as we talked about on
10:53:37 4 the way up here, I can live with that.

10:53:40 5 THE COURT: Thank you. Then there is the
10:53:42 6 demonstrative evidence. I forget what the exact dispute
10:53:47 7 here was.

10:53:47 8 MR. MURRELL: If I could articulate it.

10:53:49 9 THE COURT: Sure.

10:53:50 10 MR. MURRELL: We agreed that any
10:53:51 11 demonstratives --

10:53:52 12 THE COURT: It was the text.

10:53:53 13 MR. MURRELL: So if you have a PowerPoint that
10:53:55 14 you're using in opening that says these are the three
10:53:58 15 issues, they're just mirroring what you're giving, they're
10:54:01 16 not exhibits, they're not demonstratives, I really don't
10:54:04 17 want to give my opening statement to the other side two days
10:54:07 18 in advance, and I don't expect them to. I don't have a
10:54:10 19 problem with giving them demonstratives, exhibits, anything
10:54:13 20 I'm going to put up --

10:54:14 21 THE COURT: There is an easy way to resolve
10:54:17 22 that. I don't really like having text put up. So why don't
10:54:21 23 we just not have text put up, you know, unless it is, sorry,
10:54:30 24 patents -- if you're putting up the specification of a
10:54:33 25 patent, yes, that's fine, that is text, but that's not what

10:54:37 1 I mean. But when you're saying outline of evidence, the
10:54:41 2 defendant, or I guess you wouldn't be saying this, the
10:54:45 3 plaintiff is a big fat liar, A, B, C, you know, that's not
10:54:52 4 helpful. You can make that outline for yourself for your
10:54:55 5 opening or whatever, but let's -- so let's not have argument
10:55:03 6 and such in the things you put on the screen. You can have
10:55:14 7 evidence, demonstrative evidence.

10:55:16 8 MR. SIMMONS: Your Honor, if I could ask for a
10:55:19 9 clarification, and that includes any demonstrative attorney
10:55:22 10 prepared evidence that's been exchanged in the case, things
10:55:24 11 like timelines, and you know, we have seen --

10:55:29 12 THE COURT: So I think a timeline, that is a
10:55:31 13 demonstrative evidence kind of thing and I think that's
10:55:34 14 something that should be exchanged. And I'm not sure
10:55:37 15 Mr. Murrell is objecting to that.

10:55:41 16 MR. MURRELL: Not at all.

10:55:43 17 THE COURT: Mr. Murrell or Mr. McGraw?

10:55:46 18 MR. MURRELL: I'm Mr. Murrell. The good looking
10:55:49 19 one is Mr. McGraw. I tried to help him out.

10:55:52 20 THE COURT: Sorry. Off the record.

10:55:54 21 (Discussion off the record.)

10:57:02 22 THE COURT: Back on the record. I think we have
10:57:04 23 demonstrative exhibits taken care of.

10:57:06 24 MR. MURRELL: Just to be clear, timelines are
10:57:08 25 fine in opening as long as they're exchanged.

10:57:11 1 MR. SIMMONS: As long as they're exchanged. If
10:57:13 2 there are objections, we have the ability to deal with those
10:57:16 3 in advance. My whole point with this is there is nothing
10:57:19 4 more unseemly than objections during opening.

10:57:24 5 THE COURT: I agree. And the tradition is you
10:57:26 6 really try to avoid that here. Maybe that's in most places.
10:57:34 7 So one way you do that is because people do argue
10:57:39 8 legitimately about things that are in slides that would not
10:57:44 9 come up from what they say. In any event, we're all in
10:57:48 10 agreement there.

10:57:49 11 All right. So the next thing where I put a tab
10:57:52 12 was on page 44 where there is the additional matters which
10:57:58 13 are described as stipulations of law of the case. And you
10:58:08 14 know, one of the things that I have not done is sit down and
10:58:11 15 compared my summary judgment opinion with the 23
10:58:18 16 stipulations of law of the case.

10:58:25 17 MR. SIMMONS: If I could make one observation,
10:58:27 18 Your Honor, as I was going through it, it looks like there
10:58:29 19 was a wholesale strike of this from the defendant's side and
10:58:33 20 then we said no, we want it back in and stated our position
10:58:37 21 and put it back in. It looks like some inadvertent ones
10:58:41 22 appear at the end, 17 through 23, so it's really 1 through
10:58:45 23 16.

10:58:46 24 THE COURT: Okay.

10:58:48 25 MR. MURRELL: And to be clear, Your Honor, we

10:58:50 1 have not proposed our own stipulation of law of the case
10:58:54 2 because our pretrial order did not suggest stipulations of
10:58:58 3 law on the case. Your summary judgment opinion we were fine
10:59:01 4 attaching as an exhibit, but in terms of us arguing among
10:59:06 5 ourselves over which you have ruled.

10:59:09 6 THE COURT: Yes. So I have never seen anything
10:59:11 7 like this in any pretrial order I have ever seen. And
10:59:21 8 without going back and checking my opinion, I find it hard
10:59:30 9 to believe that there is sixteen different rulings that I
10:59:35 10 actually made that limit what people can do. It was a
10:59:45 11 summary judgment opinion, had some Daubert issues, number
10:59:51 12 15, defendant may not offer the unredacted portion of the
10:59:54 13 May 11th letter from plaintiff's attorney into evidence. I
10:59:58 14 just find it hard to believe that was something I actually
11:00:01 15 ruled on in the context of a summary judgment opinion. And
11:00:08 16 so -- and you know, when you grant summary judgment, okay,
11:00:13 17 you have done something and that's resolved. When you deny
11:00:16 18 summary judgment, usually you haven't resolved anything at
11:00:20 19 all. I had one case early on where my denial of summary
11:00:25 20 judgment consisted of one sentence, but I don't think I
11:00:28 21 actually -- just because I said various things as I was
11:00:33 22 going through, I kind of doubt that it has all this impact.
11:00:37 23 But at some point, I guess I will look down and see, because
11:00:42 24 it seems to me that it's not too hard, because you have
11:00:46 25 cited all the pages where you think I have made some

11:00:49 1 rulings, and to the extent that -- and so the one benefit of
11:00:55 2 this is the summary judgment ruling was more than a year
11:01:01 3 ago.

11:01:02 4 If you said okay, we're going to ask you ten
11:01:07 5 questions about the summary judgment ruling and if you get
11:01:10 6 more than two of them wrong, we're going to start shooting
11:01:15 7 your children, I would be sweating bullets. And so if
11:01:19 8 people are going to be making objections, you already ruled
11:01:24 9 on this, it's better to figure out what I already ruled on
11:01:28 10 in advance, but I'm very dubious that I made all these
11:01:32 11 rulings that actually have any impact on what we're going to
11:01:35 12 do at trial.

11:01:38 13 So as long as these things are in here, we'll go
11:01:45 14 through and check them and see whether or not -- how many of
11:01:50 15 them I actually agree with. But I would be surprised. Is
11:01:56 16 there anything else you all want to say about it?

11:01:58 17 MR. SIMMONS: I think that covers it, Your
11:02:00 18 Honor.

11:02:00 19 MR. MURRELL: Other than we did not propose our
11:02:02 20 own.

11:02:03 21 THE COURT: Right. As I said, that's my usual.
11:02:07 22 I have never seen it before.

11:02:08 23 So then we have the trial length issue. And
11:02:13 24 then we have -- then we have on page 50, defendant's
11:02:19 25 objections to previously undisclosed witnesses. And there

11:02:24 1 is a list of seven people. And I checked to see that they
11:02:27 2 were actually on plaintiff's witness list and they seem to
11:02:31 3 be travel agents from all around the country and maybe a few
11:02:34 4 employees of the plaintiff. And it's curious because if
11:02:42 5 they have never been disclosed, for sure they have never
11:02:45 6 been deposed. And I didn't really think people, travel
11:02:49 7 agents from California were going to be coming here for this
11:02:52 8 trial.

11:02:53 9 So I guess my real question is, is -- sometimes
11:02:57 10 plaintiff, or a party will say well, just in case there is
11:03:01 11 an objection to this document, we have a custodian of
11:03:04 12 records or something like that. Do you have any serious
11:03:08 13 plans to call any of these people?

11:03:09 14 MR. SIMMONS: Potentially, Your Honor, what we
11:03:12 15 would like to do is work through it. Let me give you a
11:03:15 16 sense of who these individuals are. Very recently in the
11:03:19 17 last thirty to forty days, we were provided additional
11:03:22 18 information about here are a group of travel agent
11:03:25 19 individuals who may have or do have direct knowledge of
11:03:29 20 actual confusion in the marketplace. And so we have been
11:03:32 21 working very hard to contact them and identify what
11:03:35 22 information they have that may or may not be relevant. Most
11:03:40 23 of that has been gathered and we can disclose that
11:03:43 24 information to Mr. Murrell and Mr. McGraw. And then we can
11:03:48 25 revisit this issue, if they're interested, if we're still

11:03:53 1 interested after having gone through that investigation
11:03:56 2 process of this new information, they're interested in
11:03:59 3 deposing one or more of the individuals that we think are
11:04:02 4 truly relevant. Obviously we won't have an objection.

11:04:06 5 THE COURT: I did see something, these people
11:04:09 6 are from -- let me see if I can figure out where -- so I saw
11:04:14 7 a number of them work for ACL and live in, or are at
11:04:19 8 Guilford, Connecticut, so I assume that's not too far away
11:04:25 9 from here and besides they are on your payroll. But the
11:04:29 10 other four, Carmel, Indiana, Half Moon Bay, California,
11:04:31 11 Ocala, Florida and the address of one person to be
11:04:34 12 announced, so the only way you can get -- I mean, you can't
11:04:41 13 subpoena these people to be here. And I understand what you
11:04:51 14 said about you're gathering information, so I take it you
11:04:55 15 don't actually -- so if you liked what one of these people
11:05:00 16 said, were you going to say we would like to depose this
11:05:06 17 person, or did you think that for whatever reason they were
11:05:10 18 so excited about this that they would travel from Half Moon
11:05:13 19 Bay they would travel and testify for ten minutes and go
11:05:15 20 back?

11:05:17 21 MR. SIMMONS: One of the interesting things in
11:05:19 22 speaking with the agents after we talked about this, we said
11:05:22 23 would you be willing to come to Delaware and at least one of
11:05:25 24 them said yes.

11:05:26 25 THE COURT: Okay.

11:05:27 1 MR. SIMMONS: It's so fresh, Your Honor, it's
11:05:29 2 within ten days of having that information.

11:05:31 3 THE COURT: Let me hear what Mr. Murrell has to
11:05:35 4 say.

11:05:35 5 MR. MURRELL: The year the case was filed was
11:05:38 6 2013. We have had all kinds of time to identify potential
11:05:41 7 witnesses and identify them. I have a real objection to
11:05:46 8 that being done this late in the game. I mean, evidence of
11:05:52 9 actual confusion in a trademark case is very powerful, and
11:05:57 10 to have them this late in the game strikes me as being very
11:06:01 11 unfair.

11:06:01 12 THE COURT: Okay. I get that. And what is your
11:06:11 13 response to that?

11:06:12 14 MR. SIMMONS: So, Your Honor, information only
11:06:14 15 comes to you when it comes to you. And through our client
11:06:17 16 and a representative who deals with travel agents throughout
11:06:20 17 the country, that representative advised our clients hey, by
11:06:24 18 the way, I know X, Y and Z who may have relevant information
11:06:30 19 which started that process. Before that call came, we
11:06:32 20 didn't have that information, so we're doing the best we
11:06:35 21 can.

11:06:35 22 THE COURT: So that brings up an interesting
11:06:38 23 question which I think was related to at least one of the
11:06:41 24 motions in limine I read, which is say the issue of
11:06:45 25 likelihood of confusion, is there a particular point in time

11:06:50 1 where we're talking about the relevance of the likelihood of
11:06:53 2 confusion, or is this unbounded by time?

11:07:00 3 MR. SIMMONS: Well, I believe, Your Honor, that
11:07:03 4 there may be a very, very relevant period when the junior
11:07:07 5 user comes into the marketplace, and that's highly relevant,
11:07:10 6 but it is also relevant what continues because there is an
11:07:14 7 argument in this case that not only are we dealing with
11:07:17 8 brand versus brand, but also brand versus family. And ACL's
11:07:22 9 family of marks is ever expanding, and so the confusion
11:07:26 10 issues continue even to today. Some of these witnesses that
11:07:29 11 we have chatted with at least initially have information
11:07:33 12 that are current and have information that are old, and
11:07:36 13 that's what we're trying to work through.

11:07:38 14 THE COURT: I guess what I'm wondering is to
11:07:42 15 Mr. Murrell's point is hypothetically, presumably you could
11:07:51 16 have, maybe you even did, say to your client, I don't know,
11:07:55 17 three years ago, so we're interested in trying to find out,
11:08:02 18 seems like it's an important issue in this case, whether
11:08:05 19 there is a confusion between your name and the defendant's
11:08:08 20 name. Can you do anything to find any information about
11:08:10 21 this? They say well, we have a network of travel agents,
11:08:14 22 let's ask them. Send out some emails, probably a group
11:08:18 23 email, probably takes thirty seconds and the information is
11:08:21 24 either produced or not produced.

11:08:25 25 So, yes, I understand you may have only gotten

11:08:31 1 the information in the very recent past, but I guess what
11:08:36 2 I'm wondering about is it seems like information that if you
11:08:47 3 had wanted to get it a couple of years ago, you could have
11:08:49 4 gotten it a couple of years ago.

11:08:51 5 MR. SIMMONS: May I respond, Your Honor?

11:08:53 6 THE COURT: Yes.

11:08:53 7 MR. SIMMONS: Every trademark client gets shaken
11:08:56 8 hard for proof of actual confusion. That's something that
11:09:01 9 happens throughout the process. In this case what happened
11:09:03 10 was a new employee came to the company. When that new
11:09:06 11 employee came to the company, that employee disclosed -- my
11:09:09 12 understanding, that employee disclosed there are these
11:09:13 13 individuals that have relevant knowledge. That's the
11:09:16 14 genesis of this.

11:09:17 15 What I can say, Your Honor, maybe as a fairness
11:09:19 16 issue is we could limit this to one or two individuals on
11:09:23 17 that list, if we find one or two that we think are highly
11:09:27 18 relevant, that would -- it lessens the burden between now
11:09:31 19 and trial.

11:09:33 20 THE COURT: Okay.

11:09:36 21 MR. WILLIAMS: I would point out one of our
11:09:39 22 frustrations is we actually did disclose some confusion
11:09:43 23 witnesses because we had heard from them and they said they
11:09:45 24 were confused, the client had. In a Rule 26(f)
11:09:50 25 disclosure --

11:09:50 1 THE COURT: But presumably not these people.

11:09:52 2 MR. WILLIAMS: No, the problem is, this was five
11:09:55 3 years ago.

11:09:55 4 THE COURT: Right. Which I think Mr. Simmons
11:09:58 5 said was at the most relevant time for the main --

11:10:03 6 MR. WILLIAMS: Well, it may have been some
11:10:07 7 relevance there, but their willingness to come to Delaware
11:10:10 8 and the parties' interest in deposing them back then was not
11:10:14 9 so paramount.

11:10:15 10 THE COURT: So Mr. Murrell, I can tell you would
11:10:17 11 like to say a little more.

11:10:18 12 MR. MURRELL: It's the same problem, Your Honor.
11:10:20 13 This information was out there and available if they wanted
11:10:23 14 to go look for it. We have confusion testimony. They have
11:10:26 15 a confusion log that they had their employees -- we think
11:10:30 16 the confusion benefits them as opposed to our client. We
11:10:35 17 have all that evidence prepared to try it. To now be
11:10:39 18 running around trying to run down new people, and to be
11:10:42 19 really concerned of, we found these people that may have
11:10:46 20 knowledge. We are going to interview eight of them, and
11:10:52 21 we'll let you depose the one or two that we think are our
11:10:53 22 best witnesses. Obviously on behalf of my client I would
11:10:53 23 want to talk to the others to see what they have to say when
11:10:56 24 interviewed as well. This is a lot to be doing in the last
11:10:59 25 couple of months before trial as we're doing everything else

11:11:02 1 and with counsel's other schedules.

11:11:06 2 THE COURT: So that seemed to me that four of
11:11:08 3 these people are travel agents. Who are the three people in
11:11:13 4 Guilford, Connecticut, are those people that used to be
11:11:18 5 travel agents but they now work for you?

11:11:20 6 MR. WILLIAMS: One person that was deposed I can
11:11:22 7 speak to has left the company, but the company has hired a
11:11:25 8 new person who has assumed that same role. And so we have
11:11:31 9 listed that new person.

11:11:33 10 THE COURT: Which one is that?

11:11:34 11 MR. WILLIAMS: Mr. Zuka, Brad Zuka.

11:11:37 12 THE COURT: Whose role did he take over? It's
11:11:40 13 not going to mean anything to me but it will probably mean
11:11:42 14 something to Mr. Murrell.

11:11:42 15 MR. WILLIAMS: I think Van Hass. He has to do
11:11:45 16 with the digital side of the sales.

11:11:49 17 THE COURT: Okay. And why is the digital side
11:11:53 18 of sales relevant?

11:11:54 19 MR. WILLIAMS: Well, they're a record -- well,
11:11:57 20 that's a longer story. But in this trial, there is, in
11:12:02 21 fact, one of the motions in limine goes to the records that
11:12:05 22 we asked be produced recently.

11:12:07 23 THE COURT: I didn't understand that's what you
11:12:09 24 meant. Okay. So basically this is somebody who is
11:12:14 25 essentially a records custodian?

11:12:17 1 MR. WILLIAMS: Well, he would -- he could bring
11:12:19 2 the records and explain them, which we think would be
11:12:25 3 helpful and expedient.

11:12:27 4 THE COURT: I'm sorry. The person who was going
11:12:29 5 to do it before him, again, what is that person's name.

11:12:33 6 MR. WILLIAMS: Mr. Van Hass. He's left the
11:12:35 7 company.

11:12:35 8 MR. MURRELL: He's been deposed.

11:12:37 9 MR. WILLIAMS: He was deposed.

11:12:39 10 THE COURT: He was deposed.

11:12:41 11 MR. WILLIAMS: That was a long time ago, so he
11:12:43 12 didn't have the current records.

11:12:46 13 MR. NACCARATO: Presumably he could report to
11:12:48 14 Charlie B. Robertson and he could testify to it.

11:12:51 15 MR. MURRELL: He reports to Charlie B., right.

11:12:54 16 MR. WILLIAMS: The gentleman, yes, that's
11:12:57 17 correct.

11:12:57 18 MR. MURRELL: Charlie B. is the son of the
11:13:01 19 owner.

11:13:02 20 THE COURT: Okay. So Brad Zuka, he is a
11:13:08 21 replacement for somebody else. It seems to me like you
11:13:11 22 ought to be able to resolve that one.

11:13:13 23 Who are Kaitlyn O'Day and Stephanie Cally?

11:13:19 24 MR. WILLIAMS: They are cruise specialists who
11:13:21 25 work -- cruise specialists, they are probably people as I

11:13:25 1 understand it, and I have not spoken to them myself, but I
11:13:28 2 believe they have heard this confusion evidence from --
11:13:31 3 because they receive calls when they reach out to people
11:13:35 4 selling cruises, or trying to sell them.

11:13:37 5 THE COURT: Okay. So basically Brad Zuka, he's
11:13:56 6 one category replacement witness. The other six people,
11:13:59 7 they're all confusion witnesses?

11:14:02 8 MR. WILLIAMS: Essentially as I understand it,
11:14:03 9 yes.

11:14:08 10 MR. SIMMONS: The four are independent agent
11:14:11 11 witnesses. The bottom four are independent agent witnesses.

11:14:15 12 THE COURT: But they're all confusion one way or
11:14:17 13 the other?

11:14:18 14 MR. SIMMONS: I believe so, Your Honor.

11:14:19 15 THE COURT: My inclination is this, I would let
11:14:22 16 you replace Mr. Van Hass with Mr. Zuka if it was the case
11:14:27 17 that Mr. Van Hass's deposition isn't good enough for your
11:14:36 18 purposes because it's been taken, and I kind of expect --
11:14:44 19 and if he's essentially just explaining the records, I don't
11:14:48 20 know, it just doesn't seem like a big deal.

11:14:51 21 MR. MURRELL: Subject to my right to depose him.

11:14:53 22 THE COURT: Yes, you could certainly depose him
11:14:56 23 if you wanted to.

11:14:58 24 You know the travel agents and the two employees
11:15:09 25 they're talking about, and I'm sorry, I think you said this,

11:15:12 1 but are they talking about present day confusion or they
11:15:16 2 remember confusion in 2013 or 2012 or whatever is the most
11:15:21 3 germane time?

11:15:22 4 MR. SIMMONS: I can't give you exact date.

11:15:24 5 THE COURT: I think Mr. Naccarato thinks he can.

11:15:28 6 MR. NACCARATO: These are new employees, newer
11:15:30 7 employees.

11:15:31 8 MR. SIMMONS: We're talking about the four
11:15:32 9 agents, the bottom four agents, Your Honor. And I dealt
11:15:36 10 with most of the discussions with them so far. And most of
11:15:39 11 them have been in the travel business for decades, and so
11:15:44 12 they would have the ability to discuss what their
11:15:47 13 recollection was at the time and now. And their
11:15:51 14 experiences.

11:15:52 15 THE COURT: So I guess what I think is this.
11:15:59 16 I'm pretty sympathetic to Mr. Murrell's position here. The
11:16:06 17 case is five years old, I guess, going to be almost six
11:16:13 18 years old by the time of trial. These people were out
11:16:20 19 there. You did extensive discovery back in the day. And I
11:16:29 20 think relative to the importance where you've already had
11:16:39 21 plenty of time to look for travel agents, for all I know you
11:16:45 22 have some travel agents somewhere, I know you have multiple
11:16:49 23 experts, it just seems to me -- and then the other thing is
11:16:54 24 I'm sitting here saying I need to slim this case down.
11:16:58 25 You're going in the wrong direction. And you're the one --

11:17:03 1 of course you're the one that wants to grow the case. But I
11:17:11 2 think the need for these people, particularly given that you
11:17:17 3 don't actually -- tell me if I'm mischaracterized what you
11:17:22 4 said, but you're pretty hazy as to what these people might
11:17:26 5 or might not say, or if you aren't hazy, it's just because
11:17:32 6 you have talked to them in the last week or so.

11:17:35 7 And so yes, there is time between now and
11:17:38 8 January to do another round of depositions, when the plane
11:17:47 9 that flies to Indiana then to California, then to Florida.
11:17:52 10 And I think that it's too late relative to any importance.
11:17:57 11 So I'm inclined to agree with Mr. Murrell on that.

11:18:09 12 Let me just see. Was there anything else in the
11:18:14 13 main body of the order here that seemed like something I
11:18:19 14 could actually meaningfully address today?

11:18:21 15 MR. MURRELL: Not that I'm aware of, Your Honor.

11:18:24 16 MR. SIMMONS: I don't believe so, Your Honor.

11:18:25 17 THE COURT: Okay. So I will tell you that on
11:18:28 18 the motions in limine, I have read them. And unlike the
11:18:35 19 motions in limine that I normally see, which don't assert a
11:18:41 20 whole lot of law, they're usually factual things of one kind
11:18:49 21 or another. You know, I didn't count the number of cases
11:18:52 22 that you cite in these seven motions in limine, but it
11:18:56 23 seemed to me to be a lot. So I basically need to spend more
11:19:06 24 time with them just to figure out what they are, which ones
11:19:10 25 I might be able to decide now, meaning sometime in advance

11:19:15 1 of trial, and which ones not.

11:19:21 2 I guess the only thing I would ask you really is
11:19:26 3 from each side's perspective, what's the most important
11:19:30 4 motion in limine that they have cited? And don't tell me
11:19:33 5 they're all important. You can take a moment to think about
11:19:37 6 this, if you want.

11:19:38 7 MR. SIMMONS: While we're going through that
11:19:40 8 exercise, Your Honor, could I ask whether we would be
11:19:43 9 presented an opportunity to argue those in our reconvene
11:19:47 10 meeting in November?

11:19:48 11 THE COURT: Yes. I think that will be fair.
11:19:51 12 Obviously I'm going to have to read them again, or I have to
11:19:55 13 think about them. But I think it's fair to say that I may
11:20:00 14 not have actually understood all of them, even at a very low
11:20:05 15 level. So yes, we could do that. And I would expect there
11:20:15 16 will be a pretty good chance that I would be able to rule on
11:20:19 17 them at the time. But that would be good, because it will
11:20:25 18 give me an opportunity to make sure that whatever it is that
11:20:28 19 I understand from reading these things is what you all are
11:20:30 20 trying to tell me. I didn't have anything more on the
11:20:35 21 motions in limine right now.

11:20:38 22 So we keep talking about this November
11:20:40 23 conference date. Do you mind excusing me for just a minute
11:20:44 24 and I will go get my calendar.

11:20:51 25 (Discussion off the record.)

11:23:51 1 THE COURT: So I don't think I really have any
11:23:57 2 time the week of November 5th. It's also Election Day, so
11:24:03 3 maybe that's not such a good week anyhow. And I don't
11:24:09 4 really have -- I'm pretty busy except for the week of
11:24:15 5 November 12th. November the 12th is Veterans Day, so we're
11:24:20 6 closed. I don't have a trial scheduled that week and at
11:24:23 7 least right now I have almost nothing else scheduled so
11:24:27 8 there is nothing more I would like to do than fill it up
11:24:29 9 with you all.

11:24:30 10 MR. MURRELL: We had the first couple of days
11:24:32 11 set aside for this trial, so the calendar should be clean.

11:24:36 12 MR. WILLIAMS: The 13th because of the holiday.

11:24:39 13 THE COURT: Yes. Part of the reason why you
11:24:43 14 moved this is -- well, I don't know. In any event, I'm free
11:24:48 15 on the 13th, the 14th, the 15th.

11:24:53 16 MR. MURRELL: We're good on our side.

11:24:56 17 MR. WILLIAMS: We're good.

11:24:56 18 THE COURT: So do you have a preference? I
11:24:59 19 imagine in the world of private practice, Veterans Day on
11:25:03 20 November 12th is probably just another working day for you
11:25:07 21 all.

11:25:08 22 MR. MURRELL: That would be accurate.

11:25:09 23 MR. WILLIAMS: That would be correct.

11:25:10 24 THE COURT: Since I do have this trial scheduled
11:25:13 25 the week before and I may spill over, why don't we go for

11:25:20 1 November 14th.

11:25:29 2 MR. SIMMONS: Your Honor, just can I ask one
11:25:32 3 question. Just because the decisions that are issued in
11:25:35 4 that hearing are going to inform our decisions at trial, is
11:25:39 5 there any possibility that the first two days in November
11:25:43 6 are available?

11:25:45 7 THE COURT: I think not.

11:25:49 8 MR. SIMMONS: The 14th works.

11:25:51 9 THE COURT: Right now I have a trial scheduled
11:25:52 10 between Mr. Kraftschik's extremely litigious individuals,
11:25:58 11 the week of October 29th, which I think you might be
11:26:00 12 involved in.

11:26:01 13 MR. KRAFTSCHIK: I am, Your Honor, yes.

11:26:03 14 THE COURT: And so do you want to tell me
11:26:06 15 they're going to settle?

11:26:07 16 MR. KRAFTSCHIK: I don't think I can tell you
11:26:09 17 that today, Your Honor.

11:26:10 18 THE COURT: All right.

11:26:11 19 MR. SIMMONS: Just a shot, Your Honor.

11:26:15 20 MR. WILLIAMS: Very careful.

11:26:16 21 THE COURT: So I could, if you all were going to
11:26:19 22 be -- I do have time on October -- well, 26th, which is
11:26:28 23 Friday, right now I have a free afternoon.

11:26:54 24 MR. MURRELL: I'm good with that. We have
11:26:56 25 already agreed to meet on October 16th while you were out

11:26:59 1 getting your calendar.

11:27:01 2 THE COURT: All right. Do you think -- I can do
11:27:03 3 it on October 26th, if you think that whatever you're
11:27:08 4 meeting on the 16th, that you'll be able to.

11:27:15 5 MR. SIMMONS: I think we can turn the issues in
11:27:17 6 ten days.

11:27:18 7 MR. MURRELL: Absolutely, that gives me more
11:27:23 8 cushion for the other trial.

11:27:24 9 THE COURT: How about we say October 26th at
11:27:27 10 1:30. And it would be -- and if you could submit whatever
11:27:57 11 additional things you're going to submit, hopefully jury
11:28:01 12 instructions -- actually why don't you tell me, what other
11:28:10 13 things do you think you might resubmit or submit additional
11:28:13 14 after you have this meeting and you work some things out
11:28:16 15 besides jury instructions?

11:28:17 16 MR. WILLIAMS: Clearly the jury instructions,
11:28:19 17 but we were discussing whether it would make sense to give
11:28:22 18 Your Honor a clean package, let's put it that way, because I
11:28:26 19 think part of the point here is to go through the documents,
11:28:28 20 that's one of the exhibits, the deposition designations,
11:28:32 21 there is a fair amount.

11:28:34 22 THE COURT: As far as I'm concerned, I don't
11:28:36 23 really need those. I'm not going to be looking at them
11:28:39 24 anyhow, so resubmitting them to me is just giving
11:28:44 25 Mr. Kraftschik's paralegal some more billable hours for no

11:28:49 1 reason. I'm sure that person is busy enough anyhow. So it
11:28:54 2 might be useful if you resubmitted just the first fifty
11:28:58 3 pages.

11:28:58 4 MR. WILLIAMS: The core?

11:28:59 5 THE COURT: Yes. Just that one thing. And so
11:29:05 6 the jury instructions are one thing, the fifty-page part,
11:29:09 7 and I would say in terms of the voir dire, if you can come
11:29:16 8 up with a joint proposal as to what I would tell the jury
11:29:19 9 about the case being about --

11:29:21 10 MR. WILLIAMS: A synopsis.

11:29:22 11 THE COURT: Synopsis. Thank you. Exactly. And
11:29:28 12 if you have any thoughts about the first issue that I raised
11:29:34 13 regarding -- and so issues for trial and whether -- and what
11:29:46 14 you think are nonjury issues, you know, I would appreciate
11:29:53 15 having that as to what you agree or disagree on, on those
11:29:57 16 things.

11:29:57 17 MR. WILLIAMS: Right.

11:30:03 18 MR. MURRELL: Would you like that on the 22nd,
11:30:06 19 Your Honor, then?

11:30:06 20 THE COURT: Yes. The 22nd would be fine. And
11:30:12 21 meanwhile, I will do this, I will file some proposed voir
11:30:22 22 dire where I have a page for the synopsis. Okay. And I may
11:30:35 23 or may not file something about the motions in limine if
11:30:42 24 upon looking at them I have some particular question or
11:30:45 25 something that would help focus what we might talk about at

11:30:50 1 the pretrial conference. But if I do that, I'll do that by
11:30:56 2 October 22nd. But unless I read through this and it seems
11:31:02 3 to me real clear upon a second reading, and I'm not sure
11:31:06 4 upon a first reading that any of it seemed real clear, if
11:31:10 5 there is something where I say oh, yeah, yeah, I'm
11:31:13 6 definitely doing this, I might include that, but basically I
11:31:17 7 expect most of these issues to be open and for discussion at
11:31:20 8 the conference. Okay?

11:31:22 9 MR. WILLIAMS: Very good.

11:31:23 10 MR. MURRELL: Very good.

11:31:23 11 THE COURT: So then while we're picking some
11:31:27 12 dates here, I take it that if we can pick a jury the week
11:31:30 13 before the scheduled trial, that's something you both would
11:31:33 14 be interested in doing?

11:31:34 15 MR. MURRELL: It is, Your Honor.

11:31:35 16 MR. WILLIAMS: Yes.

11:31:36 17 MR. MURRELL: I have a final pretrial in another
11:31:39 18 case on the 3rd, so if we could do it on the 4th.

11:31:43 19 THE COURT: The 4th probably works. So normally
11:31:49 20 we get juries in at 9:30 a.m., so we'll say jury selection
11:31:56 21 January 4th at 9:30 a.m.

11:32:13 22 So is there anything else that we talked about
11:32:15 23 that I need to write down on the list here?

11:32:17 24 MR. KRAFTSCHIK: Not that I need to write down,
11:32:19 25 Your Honor. Just a clarification about the voir dire, I

11:32:21 1 know I owe you a Word version of what we have submitted.

11:32:25 2 THE COURT: Yes.

11:32:25 3 MR. KRAFTSCHIK: Could we get that to you maybe
11:32:27 4 early next week? I think there was one question we hoped to
11:32:31 5 meet and confer.

11:32:32 6 THE COURT: No. That's fine. That's fine. I
11:32:37 7 was not even going to be thinking about it until sometime
11:32:40 8 after next week, so yes, that's fine.

11:32:45 9 Anything else you want to talk about this
11:32:47 10 morning or about anything?

11:32:50 11 MR. MURRELL: No, Your Honor.

11:32:52 12 MR. SIMMONS: No, Your Honor. Thank you.

11:32:54 13 MR. WILLIAMS: Thank you, Your Honor.

11:32:55 14 THE COURT: Okay. All right. So I'm going to
11:33:00 15 ask one favor of Mr. Kraftschik, whether it's possible for
11:33:08 16 you to submit a proposed order just reflecting what we've
11:33:12 17 agreed that we are doing here.

11:33:14 18 MR. KRAFTSCHIK: Yes, we'll prepare that in
11:33:18 19 accord with both sides to make sure we get everything.

11:33:20 20 THE COURT: I think that would be good.

11:33:21 21 MR. MURRELL: I did have one other question. I
11:33:24 22 understand you have a hearing at 11:30.

11:33:26 23 THE COURT: Okay.

11:33:27 24 MR. MURRELL: I was saying that we brought our
11:33:29 25 paralegal in part to look at the courtroom and figure out

11:33:31 1 the practical way to set up for trial. And I don't know if
11:33:34 2 it would be possible to come back after lunch.

11:33:37 3 THE COURT: Sure. Let me actually check,
11:33:39 4 because I didn't know I had a hearing at 11:30. So probably
11:33:48 5 I'm going to bring those people back here so the courtroom
11:33:51 6 will be free. Let me just see how excited I am about
11:33:55 7 meeting these people. Okay. You know, I have it down. I
11:34:03 8 thought it was in the afternoon, but I'm ready for it.

11:34:06 9 So if we're done here, why don't we clear out,
11:34:10 10 Mr. Murrell, you and your paralegal or whoever wants to look
11:34:14 11 at the courtroom. I may just check -- actually what I would
11:34:19 12 like to do is bring one of my staff in just because that's
11:34:25 13 beyond my authority to actually allow you to do that.

14 (Conference concluded at 11:34 a.m.)

15

16 I hereby certify the foregoing is a true and accurate
17 transcript from my stenographic notes in the proceeding.

18 /s/ Dale C. Hawkins
19 Official Court Reporter
20 U.S. District Court
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